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In the Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,

v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. AND TRUCKING MANAGEMENT, INC. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

CHARLES P. O'CONNOR
(Counsel of Record)
ROBERT A. DUFEK
PETER BUSCEMI
STANLEY F. LECHNER
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
Attorneys for Amici Curiae

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BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. AND TRUCKING MANAGEMENT, INC. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

This brief is submitted by the Bituminous Coal Operators' Association, Inc., and Trucking Management, Inc., as amici curiae in support of respondents. The parties have consented to the filing of this brief. Copies of their letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

The Bituminous Coal Operators' Association, Inc. ("BCOA") is a multiemployer bargaining association that, for nearly fifty years, has negotiated with the United

Mine Workers of America ("UMWA") for the major collective bargaining agreement in the coal industry, the National Bituminous Coal Wage Agreement ("NBCWA"). In particular, BCOA has negotiated numerous amendments to the 1950 NBCWA, as well as the NBCWAs of 1971, 1974, 1978, 1981, 1984, 1988, and 1993. BCOA members include large and small coal companies throughout the country. The current collective bargaining agreement negotiated by BCOA, the NBCWA of 1993, covers approximately 50,000 active UMWA-represented employees and approximately 100,000 retirees who receive pension, health, and other benefits as negotiated in the NBCWA.

Trucking Management, Inc. ("TMI") is a multiemployer bargaining association that negotiates with the International Brotherhood of Teamsters ("Teamsters") for the major collective bargaining agreement in the trucking industry, the National Master Freight Agreement ("NMFA"). TMI and its predecessor, Trucking Employers, Inc. ("TEI"), have negotiated the NMFA with the Teamsters every three years since 1964. TMI's member carriers include the largest and smallest trucking companies in the United States, employing from two to more than 17,000 regular employees. The current collective bargaining agreement negotiated by TMI, the NMFA of 1994, governs the terms and conditions of employment for approximately 110,000 Teamster-represented employees throughout the country.

BCOA and TMI are interested in this case because it concerns fundamental principles of federal labor law and policy that affect all industries that negotiate on a multiemployer basis, including coal and trucking. The positions taken by the petitioners, the players associations, and the government, are a radical departure from decades of precedent and, if accepted by this Court, would prolong labor disputes, expose BCOA and TMI member companies to potentially ruinous antitrust litigation, and effectively put an end to multiemployer bargaining.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a traditional labor dispute in an unusual setting, namely, professional football. The subject of the dispute (the employer's unilateral implementation of a wage proposal after negotiating in good faith to an impasse) has been grist in the mill of traditional labor law for more than fifty years. The "industry" in which the dispute arises, however, is not the typical American workplace.

Apart from the rather obvious differences between a football field and a factory, mine, or warehouse, the various teams in the National Football League do not compete economically in the same sense that coal companies or trucking companies do. NFL teams cannot do without one another. In a real sense, all NFL teams are engaged in a single venture, in whose success they have a shared interest. Although competitors on the field, the various teams are economic joint venturers, which depend on each other to produce the entertainment product that they sell. Of necessity, the teams must act as a single entity in establishing playing rules, schedules, officiating standards, roster regulations, and other measures that affect the on-the-field competition among the league's members. Under the labor laws, the NFL could be viewed as a "single employer." If that approach were followed, this case would be over (and BCOA and TMI would have no need to participate), because no one questions the right of a single employer, following an impasse in collective bargaining, to implement terms and conditions of employment included within the employer's pre-impasse bargaining proposal.

As the case comes to this Court, however, the parties and the courts below all appear to be proceeding on the assumption that, at least with respect to player compensation, the NFL teams are separate employers that participate on a multiemployer basis in collective bargaining with the players' union. Not being part of the football

business, and not having any direct interest in the compensation of football players, BCOA and TMI accept this assumption for purposes of this brief. The important point from BCOA's and TMI's perspective is that, if indeed the NFL teams are separate employers that engage in multiemployer bargaining, then that multiemployer bargaining must be governed by the same federal laws and policies that govern in numerous other industries that bargain on a multiemployer basis, such as mining, transportation, construction, maritime, hotels, and retail food. In deciding this case, therefore, the Court should consider the history of multiemployer bargaining in this country, the federal labor laws and policies that have protected multiemployer bargaining groups from collateral attack under the antitrust laws, and the profound impact that a reversal of those policies in this case would have on longstanding bargaining relationships across industry lines.

In brief, the decision of the court of appeals should be affirmed because it is based on well-established principles of federal labor law and policy that have governed multiemployer bargaining for many decades. The National Labor Relations Act expresses our national policy that unbridled competition over the price of human toil has no place in American society. Federal labor policy actively supports collective bargaining "to eliminate competition over wages and working conditions." *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975). This policy would be completely undermined if a multiemployer bargaining association's efforts to standardize terms and conditions of employment for bargaining unit employees (such as the $1,000 per week salary in this case) were subject to the federal antitrust laws.

The right of employers unilaterally to implement terms and conditions of employment upon reaching an impasse after good-faith bargaining has been recognized under federal labor law for more than fifty years. Unilateral

implementation is a legitimate self-help measure available to employers under federal labor law to break an impasse. There is no principled reason why a multiemployer bargaining group should be denied the use of this lawful bargaining tactic, or subjected to antitrust exposure for engaging in self-help authorized by the labor laws.

The purpose of the nonstatutory labor exemption to the antitrust laws is to distinguish collective bargaining activities from antitrust restraints of trade and to enable the collective bargaining process to work. If the position advocated by petitioners or the government were adopted by the Court, multiemployer bargaining would come to a grinding halt. Union-sponsored antitrust litigation would become a "powerful new weapon" in collective bargaining. Unions would have a greater incentive to litigate than to negotiate. Subject to new antitrust exposure, and deprived of a traditional self-help remedy, employers simply would no longer agree to participate in multiemployer bargaining. Among other things, this would destabilize labor relations in many industries, jeopardize longstanding group benefit programs, and increase labor strife.

ARGUMENT

I. THIS CASE IS NOT CONFINED TO PROFESSIONAL SPORTS. IT AFFECTS LABOR-MANAGEMENT RELATIONS IN MANY BASIC INDUSTRIES THAT NEGOTIATE ON A MULTIEMPLOYER BASIS

Multiemployer bargaining in professional sports is subject to the same federal labor laws and policies that govern multiemployer bargaining in other industries. Therefore, to put this dispute in its proper context, the Court should consider the historical significance of multiemployer bargaining, its favored status under our national labor policy, why it has flourished in diverse industries such as coal and trucking, and how it benefits employers, employees, and the public at large.

Multiemployer bargaining has had an important place in labor-management relations in this country for more than 100 years. As this Court stated nearly forty years ago, "[m]ultiemployer bargaining long antedated the Wagner Act, both in industries like the garment industry, characterized by numerous employers of small work forces, and in industries like longshoring and building construction, where workers change employers from day to day or week to week." *NLRB v. Truck Drivers Local Union No. 449 ("Buffalo Linen")*, 353 U.S. 87, 94 (1957).

More recently, in another case arising in the multiemployer context, the Court cited a survey from the Bureau of Labor Statistics ("BLS") showing the prevalence of multiemployer bargaining at that time. Of major collective-bargaining agreements in 1980 (those covering 1,000 or more employees), 42% were multiemployer agreements. *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 410 n.4 (1982). A more recent (1994) BLS survey of major collective bargaining agreements (those covering 1,000 or more employees) showed that 44% were multiemployer agreements and that 2,305,478 employees were covered by those agreements. *See* U.S. Dept. of Labor, Bureau of Labor Statistics, Major Bargaining Units and Employment in Private Industry, by Type of Bargaining Unit (Feb. 14, 1996) (unpublished data).[1]

Although multiemployer bargaining is not expressly addressed in the National Labor Relations Act ("NLRA"), Congress, the National Labor Relations Board ("NLRB"), and this Court long have recognized that multiemployer bargaining not only is permitted under the NLRA, but enjoys a favored status under federal labor policy. As this Court stated in *Buffalo Linen*, the congressional debates on the Taft-Hartley Amendments to the NLRA in

[1] For the Court's convenience, BCOA and TMI have lodged a copy of this data with the Clerk of the Court.

1947 show that Congress rejected proposals to outlaw or limit multiemployer bargaining, and recognized that in many industries multiemployer bargaining is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." 353 U.S. at 95-96.

Congress favored multiemployer bargaining for several reasons. Multiemployer bargaining enables small employers to bargain on a more equal footing with a large union. It helps unions and employers standardize wages. It prevents one employer from gaining a competitive advantage over another by lowering wages and benefits. It encourages employers to join together to develop industry-wide benefit programs that employers could not offer individually. *Bonanno Linen*, 454 U.S. at 409 n.3. And, as the NLRB has stated, multiemployer bargaining encourages both sides to adopt a flexible attitude during negotiations. "[E]mployers can make concessions 'without fear that other employers will refuse to make similar concessions to achieve a competitive advantage,' and a union can act similarly 'without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers.'" *Id.* (quoting Brief for the NLRB at 10).

In the trucking industry, which includes hundreds of companies, large and small, multiemployer bargaining serves many of these beneficial purposes. Consistent with the underlying purpose of the federal labor laws, multiemployer bargaining takes wages and working conditions out of competition for a large segment of the industry. It enables scores of employers to bargain on an equal footing with the Teamsters, a large and powerful union. It has enabled hundreds of trucking companies to join together and create several of the largest health and retirement funds in the nation, providing health and pension benefits to hundreds of thousands of active and retired employees and their families. It has established a national

grievance system that resolves internally, without the involvement of the courts and without work stoppages, workplace disputes involving more than 100,000 Teamster-represented employees, including diverse issues such as subcontracting and the closing of terminals. Although always subject to improvement (like any collective bargaining agreement), the National Master Freight Agreement, in its 32-year history, has stabilized labor relations in the trucking industry and reduced labor strife.

Similarly, multiemployer bargaining has played an important role for employers, employees, and the public at large in the coal industry. Coal mining is distinguished in part by "[t]he continual discovery of new coal mines and exhaustion of old ones," which has led "to a very high turnover of employers" and substantial mobility of employees. *Connors v. Link Coal Co.*, 970 F.2d 902, 903 (D.C. Cir. 1992). Accordingly, since 1950, labor and management in the coal industry have negotiated through national, multiemployer bargaining agreements a health and retirement system that has provided "a means for assuring workers retirement benefits without linking specific workers to specific employers." *Id.* In other words, employees who worked for several different employers, and so-called "orphan" miners whose employers went out of business, have received health and pension benefits under this system for more than four decades. This industry-wide benefit program simply would not have been possible without multiemployer bargaining.

More recently, BCOA and the UMWA have negotiated other group benefit programs such as the UMWA-BCOA Training and Education Fund, which provides financial assistance for training or education of unemployed UMWA miners and their dependents, and the UMWA-BCOA Labor Management Positive Change Fund, which provides financial assistance for various programs to foster greater cooperation between labor and management in the coal industry.

In short, BCOA and TMI urge the Court not to lose sight of the fact that the resolution of this case will have repercussions far beyond the world of highly compensated professional athletes. The opinion of the court of appeals is grounded in fundamental principles of federal labor law and policy that affect multiemployer bargaining relationships covering millions of employees in numerous basic industries.

II. A MULTIEMPLOYER BARGAINING ASSOCIATION SHOULD NOT BE SUBJECT TO LIABILITY UNDER THE ANTITRUST LAWS FOR ENGAGING IN ECONOMIC SELF-HELP THAT HAS BEEN LAWFUL UNDER FEDERAL LAW FOR THE PAST FIFTY YEARS

The National Labor Relations Act, commonly known as the Wagner Act,[2] and the Labor-Management Relations Act, commonly known as the Taft-Hartley Act,[3] have established private collective bargaining as the regime governing relations between employers and their unionized employees. The basic legislative principles underlying these statutes are the preference for collective rather than individual bargaining, and the conviction that private parties should negotiate their own labor solutions, without government interference. *See, e.g., NLRB v. Insurance Agents' Int'l Union,* 361 U.S. 477, 488 (1960) ("Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences"); *J.I. Case Co. v. NLRB,* 321 U.S. 332, 337 (1944) ("Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act").

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[2] 49 Stat. 449 (1935) (codified as amended, 29 U.S.C. §§ 141-187 (1994)).

[3] 61 Stat. 136 (1947) (codified as amended, 29 U.S.C. §§ 141-187 (1994)).

To ensure a level playing field, Congress created in the NLRA a series of procedural rules to govern the entire collective bargaining process. These rules, for example, establish the "mutual obligation" of employers and unions to negotiate in good faith throughout the bargaining process (including periods after contract expiration and after impasse), and they define conduct that constitutes unfair labor practices by employers and unions. *See, e.g.*, NLRA §§ 8(a) and (b) (29 U.S.C. §§ 158(a) and (b)) (describing unfair labor practices by employers and labor organizations); NLRA § 8(d) (29 U.S.C. § 158(d)) (describing the "mutual obligation" of employers and labor organizations to bargain collectively).

In interpreting these provisions, the NLRB and the courts consistently have recognized that economic self-help by employers and unions is necessary, lawful, promotes collective bargaining, and strongly encourages the parties to reach collective bargaining agreements. *See, e.g., Insurance Agents' Int'l Union*, 361 U.S. at 489 ("The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized").

A union's economic self-help remedies, which it can use after contract expiration, include tactics such as picketing, strikes, whipsaw or selective strikes, and boycotts. A multiemployer group's collective self-help remedies include lockouts, the hiring of replacement workers, and implementation of terms and conditions of employment following impasse. *See Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23 (1973), *enforcement denied on other grounds*, 500 F.2d 181 (5th Cir. 1974). It is well-established that the availability of self-help remedies continues following impasse, when either party "may increase economic pressure on one or both sides, and thus increase the desire for agreement." *Charles D. Bonanno Linen*

Service, Inc., 243 N.L.R.B. 1093, 1093-94 (1979), *enf'd*, 630 F.2d 25 (1st Cir. 1980), *aff'd*, 454 U.S. 404 (1982).[4]

The court of appeals in this case concluded, not surprisingly, that a multiemployer bargaining group's use of economic self-help after impasse (*i.e.*, the unilateral implementation of wage rates contained in the group's pre-impasse proposal), which has long been authorized under federal labor law, did not violate the antitrust laws. The court's decision was based on the nonstatutory labor exemption to the antitrust laws.

The nonstatutory labor exemption reflects judicial recognition that concerted activity in the context of multiemployer collective bargaining is regulated primarily by the more specific and later-enacted labor laws, rather than the antitrust laws. For decades, this Court and lower federal courts consistently have held that concerted economic self-help, in the various forms contemplated and approved by the labor laws, cannot provide the basis for an antitrust claim. As the Second Circuit recently observed,

> we find during the 104 succeeding years [after passage of the Sherman Act] not a single instance, prior to this very case, of a union or an individual employee asserting the stark claim that the routine practices of multiemployer bargaining violate the antitrust laws.

National Basketball Ass'n v. Williams, 45 F.3d 684, 689 (2d Cir. 1995), *cert. pending*, No. 95-137 (filed July 24, 1995).

The right of employers unilaterally to implement terms and conditions of employment after impasse has been

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[4] Although federal labor law permits a union to exercise all of its self-help remedies after contract expiration, an employer must wait until a good-faith impasse has been reached before it can unilaterally change a term or condition of employment. *See NLRB v. Katz*, 369 U.S. 736 (1962).

recognized under federal labor law for more than fifty years. *See, e.g., Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967) ("[A]fter bargaining to an impasse . . . an employer does not violate the [NLRA] by making unilateral changes that are reasonably contemplated within his pre-impasse proposals"), *pet. for review denied sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968); *NLRB v. McClatchey Newspapers, Inc.*, 964 F.2d 1153, 1157 (D.C. Cir. 1992) (statement of Edwards, J.) (same); *Atlas Tack Corp.*, 226 N.L.R.B. 222, 227 (1976) (same), *enf'd without op.*, 559 F.2d 1201 (1st Cir. 1977); *American Laundry Machinery Co.*, 107 N.L.R.B. 1574, 1579 (1954) (same). *See also Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988) ("If the parties were indeed at an impasse, then the employer's statutory duty to maintain the status quo during postcontract negotiations would end") (citation omitted); *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) ("an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment") (citing *NLRB v. Katz*, 369 U.S. 736 (1962)). The NLRB recognized this right in its earliest days, even before Congress passed the Taft-Hartley Act in 1947. *See Westchester Newspapers, Inc.*, 26 N.L.R.B. 630, 642-43 (1940) (finding that an employer did not violate its duty to bargain in good faith by unilaterally changing the basis of employee pay where "the negotiations were in suspension" and the employer had "engaged in conferences and extended discussions with the Union with respect to the Union's demands, presented counterproposals, and made concessions").

This fundamental labor law right to implement terms and conditions of employment after impasse applies equally to employers negotiating on a multiemployer basis and to employers negotiating individually with unions. *See, e.g., Powell v. National Football League*, 930 F.2d

1293, 1303 n.10, 1304 (8th Cir. 1989) (holding that "the nonstatutory labor exemption extends beyond impasse" and permits multiemployer association to unilaterally impose prior terms of employment and new terms of employment), *cert. denied*, 498 U.S. 1040 (1991); *United Fire Proof Warehouse Co. v. NLRB*, 356 F.2d 494, 498-99 (7th Cir. 1966) (upholding a multiemployer bargaining group's unilateral implementation of a wage decrease following impasse). *See also Paramount Liquor Co.*, 307 N.L.R.B. 676, 686 (1992) (holding that employers, which had engaged in joint negotiations with the union, had lawfully implemented a wage reduction after impasse); *Salinas Valley Ford Sales, Inc.*, 279 N.L.R.B. 679, 690 (1986) (upholding employers' joint implementation of new wage scale provision that employees viewed as less favorable than previous wage scale).

No authority or case precedent holds that an employer's right to engage in economic self-help is diminished or lost when the employer decides to negotiate on a multiemployer basis. Indeed, since it is undisputed that a single employer may implement after impasse *and* that Congress sought to encourage multiemployer bargaining, it is difficult to discern what logic could lead to the conclusion that an industry choosing to proceed on a multiemployer basis could do so only by surrendering one of the fundamental self-help weapons that otherwise would be available to the group's members.

This Court and lower federal courts repeatedly have held that multiemployer bargaining groups may utilize the same economic weapons as employers negotiating on an individual basis. *See, e.g., Bonanno Linen*, 454 U.S. at 412 (right of multiemployer group to hold members in the group after impasse to maintain unit solidarity); *NLRB v. Brown*, 380 U.S. 278, 284-86 (1965) (right of multiemployer group to hire temporary workers to replace locked out employees); *Buffalo Linen*, 353 U.S. at 97 (right of multiemployer group to lockout employees

in response to a "whipsaw" strike); *Powell*, 930 F.2d at 1303 n.10, 1304 (right of multiemployer group to unilaterally impose prior terms of employment and new terms of employment after impasse); *United Fire Proof Warehouse*, 356 F.2d at 498-99 (right of multiemployer group to impose wage decrease following impasse). *See also Kennedy v. Long Island R.R.*, 319 F.2d 366, 372-73 (2d Cir.) (establishing a multiemployer strike insurance fund to combat a "whipsaw" strike does not violate the Railway Labor Act, the Sherman Act, or the Interstate Commerce Act), *cert. denied*, 375 U.S. 830 (1963).

The government argues in its brief that the nonstatutory exemption must end after impasse. *See* Brief of the United States and the Federal Trade Commission at 16-17. Judge Wald, in her dissenting opinion below, stated that impasse marks the point at which "the employer has exhausted its statutory duty to bargain." Pet. App. 52a (emphasis deleted). These remarkable and unprecedented positions regarding the role of impasse in labor relations are directly contrary to numerous NLRB decisions, the position that the government took before this Court in *Bonanno Linen*, and this Court's decision in that case.

Impasse does not mark the end of the bargaining process, nor does it terminate the employer's duty to bargain; rather, it is simply one point in the collective bargaining process, one stopping place along the road to a new collective bargaining agreement. For instance, in its seminal decision in *Hi-Way Billboards*, the NLRB described impasse as a time at which the parties "often resort to forms of economic persuasion to establish the primacy of their negotiating position." 206 N.L.R.B. at 23.

The Board, in its brief to this Court in *Bonanno Linen*, characterized a bargaining impasse as commonplace, stating that impasse is "part of the normal process of attempting to reach an agreement in collective bargaining." Brief

for the NLRB in *Bonanno Linen* (No. 80-931), at 21. The Court accepted the Board's characterization of impasse. "As a recurring feature in the bargaining process, impasse is only a temporary deadlock . . . 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Bonanno Linen*, 454 U.S. at 412 (quoting *Charles D. Bonanno Linen Service, Inc.*, 243 N.L.R.B. 1093, 1093-94 (1979)).

Contrary to the views of Judge Wald and the United States as amicus curiae, impasse is simply a point in the collective bargaining process where parties retreat from face-to-face negotiations and attempt to strengthen their bargaining position through the use of economic weapons such as strikes, boycotts, lockouts, and unilateral implementation. *See* Brief for the NLRB in *Bonanno Linen* at 22 (quoting the Board's decision in *Bonanno Linen* to the effect that impasse "may provide time for reflection and a cooling of tempers . . . demonstrate the depth of a party's commitment to a position taken in the bargaining [or] . . . increase economic pressure on one or both sides, and thus increase desire for agreement"); *see also id.* at 21-22 ("Despite the existence of an impasse, a sense of the inevitability of eventual settlement underlies almost all collective bargaining negotiations").

In light of the above, there is no principled or logical basis for subjecting multiemployer bargaining groups to liability under the antitrust laws for collectively implementing terms and conditions of employment for bargaining unit employees once they reach a "temporary deadlock" in their negotiations. The central purpose of the nonstatutory labor exemption is to permit the collective bargaining process to work. So long as the collective bargaining process is continuing, the labor exemption is necessary. Without the labor exemption, the essence of multiemployer collective bargaining (*i.e.*, collective activity by employers that otherwise are competitors in the marketplace) would be banned by the antitrust laws.

For this reason, this Court and the federal courts of appeals consistently have applied the nonstatutory labor exemption to protect multiemployer bargaining groups from liability under the antitrust laws for conduct (including economic self-help) authorized under the labor laws. *See, e.g., Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965) (plurality opinion) (holding that multiemployer agreement restricting hours of work was protected by nonstatutory labor exemption because "the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work"); *Williams*, 45 F.3d at 689 (nonstatutory labor exemption protected multiemployer group's collective imposition of prior employment terms after contract expiration); *Powell*, 930 F.2d at 1303 n.10, 1304 (nonstatutory exemption protected multiemployer group's collective imposition of both prior and new terms of employment after impasse); *Clune v. Publishers' Ass'n of New York City*, 214 F. Supp. 520 (S.D.N.Y.) (rejecting union antitrust action to challenge multiemployer group lockout in response to a selective strike), *aff'd*, 314 F.2d 343 (2d Cir. 1968). *See also Amalgamated Meat Cutters v. Wetterau Foods*, 597 F.2d 133, 136 (8th Cir. 1979) (applying nonstatutory labor exemption to defeat union antitrust action challenging alleged conspiracy to obtain and employ replacement workers during strike); *Kennedy*, 319 F.2d at 372-73 (rejecting union effort to use antitrust laws to stop multiemployer group from creating strike insurance fund to combat union "whipsawing tactics").

As all of these cases hold, the nonstatutory labor exemption protects a multiemployer bargaining group from antitrust liability whenever the group is engaging in concerted activity (including economic self-help) authorized by the labor laws and directed toward the labor market involved in collective bargaining. That

is not to say, however, that multiemployer bargaining associations have blanket immunity from the antitrust laws. As this Court has held, the nonstatutory exemption does not apply where restrictive labor provisions have been directed against employers outside the bargaining unit. *See, e.g., Connell Constr. Co.*, 421 U.S. at 625-26 (refusing to apply exemption to an agreement between general contractors and a union that directly excluded nonunion subcontractors from a portion of the market); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) (holding that nonstatutory exemption does not protect union-employer agreement to impose union wage scale on employers outside the multiemployer unit).

This case, by contrast, raises none of the legitimate antitrust concerns identified by the Court in *Connell* and *Pennington*. Unlike the activity in *Connell* and *Pennington*, which was directed against employers outside the multiemployer bargaining unit, the concerted activity at issue here (*i.e.*, the setting of wages for bargaining unit employees) is confined to the labor market involved in collective bargaining. Moreover, the alleged "restraint" (*i.e.*, uniform wage rates) is plainly a mandatory subject of bargaining that affects only the labor market and not the product market.

In effect, petitioners and the government challenge the multiemployer bargaining process itself. This case involves a frontal assault on the kind of conduct that is at the very core of multiemployer bargaining, collective activity by a multiemployer group directed toward the negotiation of terms and conditions of employment for bargaining unit employees. If members of a multiemployer bargaining group are subject to antitrust liability when they join together after contract expiration, or after impasse, to exert economic pressure on a union to achieve an acceptable collective bargaining agreement, then the nonstatutory labor exemption is devoid of meaning. If the nonstatutory labor exemption does not pro-

tect the multiemployer collective activity involved in this case, which is confined to a mandatory subject of bargaining in the bargaining unit, then multiemployer collective bargaining as it has been known for years simply will not work.

III. THE POSITION ADVOCATED BY PETITIONERS AND THE GOVERNMENT WOULD OPEN THE FLOODGATES OF UNION-SPONSORED ANTITRUST LITIGATION, PROLONG LABOR DISPUTES, AND ULTIMATELY DESTROY MULTIEMPLOYER BARGAINING

According to petitioners, the nonstatutory labor exemption from the antitrust laws should expire (and multiemployer bargaining groups should be subject to antitrust liability) upon expiration of a collective bargaining agreement. The government disagrees, arguing instead that the nonstatutory labor exemption should expire once the parties reach impasse in their collective bargaining negotiations. Neither position makes any sense.

BCOA has negotiated on a multiemployer basis in the coal industry for more than 45 years. TMI and its predecessor have negotiated on a multiemployer basis in the trucking industry for more than 30 years. This extensive experience in negotiating with major and aggressive national unions leads to the inescapable conclusion that the positions advanced by petitioners and the government, if adopted by this Court, would (1) thrust antitrust courts into traditional collective bargaining disputes, (2) expose employers to antitrust liability and financial ruin for collective actions routinely taken in multiemployer bargaining, and (3) ultimately destroy multiemployer bargaining.

The fact that petitioners and the government do not agree on when the exemption supposedly "expires" is telling. It shows that their positions are arbitrary, without logical support, and uncoupled from the rationale underlying the nonstatutory labor exemption. Neither position

is based on judicial precedent, and neither position comports with federal labor policy. There is no principled basis for the proposed expiration dates that petitioners and the government would foist on the Court.

Even the government recognizes the folly of petitioners' position. Antitrust immunity cannot end at the expiration of a collective bargaining agreement. After the expiration of a collective bargaining agreement, there is a statutory obligation under Section 8(d) of the NLRA for a multiemployer bargaining group to preserve the status quo by continuing mandatory subjects of bargaining. If the nonstatutory exemption ended at this point, employers would be in an impossible position. If the employers continued the terms and conditions of employment after contract expiration, they would be subject to treble damages under the antitrust laws. If the employers unilaterally changed the terms and conditions of employment after contract expiration, they would violate Section 8(d) of the NLRA. *See* Brief of the United States and the Federal Trade Commission at 16.

Moreover, petitioners' position that multiemployer bargaining groups should be subject to antitrust liability for engaging in collective self-help after contract expiration collides head-on with two decisions of this Court. If petitioners are suggesting that these cases should be overruled, they have not articulated any rationale to support their position.

In *Buffalo Linen*, the Court, in a unanimous decision, upheld a multiemployer bargaining group's lockout of union employees after the collective bargaining agreement had expired and the union had engaged in a selective or "whipsaw" strike. In affirming the legality of the employers' collective bargaining pressure, the Court acknowledged the strong federal labor policy favoring multiemployer bargaining and stated that it would not "deny self-help by employers when legitimate interests of employees and employers collide." 353 U.S. at 96.

Similarly, in *NLRB v. Brown*, 380 U.S. 278 (1965), the Court upheld a multiemployer bargaining group's decision to lockout bargaining unit employees and hire temporary replacement workers after the expiration of the collective bargaining agreement. In affirming the legality of the employers' agreement to assert collective pressure on the union, the Court expressly recognized that this activity was important for the employers to sustain "the common front essential to multiemployer bargaining." *Id.* at 284. Each of these cases approved multiemployer self-help after contract expiration, and each fatally undercuts petitioners' position.

If the nonstatutory exemption ends when the collective bargaining agreement expires, employers will be wary about continuing to enforce, after expiration, *any* provision of a collective bargaining agreement that could raise antitrust issues. If, as petitioners contend in this case, the establishment of a uniform weekly salary is subject to antitrust scrutiny, then countless other provisions in collective bargaining agreements could be challenged as well, such as shift differentials, holiday pay, clothing allowances, sickness and accident benefits, and the rate at which employers contribute to health and retirement funds.

If employers fear the prospect of antitrust litigation arising out of provisions that affect only bargaining unit employees, employers surely will be reluctant to continue enforcing so-called "work preservation" provisions that primarily affect bargaining unit employees, but secondarily affect other employers outside the bargaining unit. These provisions likely would be attacked under the antitrust laws not by unions, which demand such protection, but by the employers that are adversely affected by them.

Ironically, this would put in jeopardy the very kinds of restrictive subcontracting provisions that unions have fought hard to preserve under Section 8(e) of the NLRA. *See* 29 U.S.C. § 158(e); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 645 (1967) (upholding a col-

lective bargaining agreement that prohibited general contractors from using premade doors in lieu of doors fitted on the worksite by union members); *NLRB v. International Longshoremen's Ass'n*, 473 U.S. 61, 76-77 (1985) (upholding a collective bargaining agreement that reserved to union members most work loading and removing containers from ships that departed from or were destined to ports within a certain geographic area). Employers that enforce such union-sponsored restrictions to the detriment of other employers after the expiration of a collective bargaining agreement would risk antitrust litigation and treble damages.[5]

Nor could an employer avoid liability by withdrawing from the multiemployer group after contract expiration, or after impasse. Once multiemployer bargaining commences, employer withdrawal is permitted only under "unusual circumstances," *Retail Associates, Inc.*, 120 N.L.R.B. 388, 395 (1958), and neither contract expiration nor impasse is sufficient. *See, e.g., Bonanno Linen*, 454 U.S. at 412 ("permitting withdrawal at impasse would as a practical matter undermine the utility of multiemployer bargaining").

The consequences of antitrust liability beginning at impasse, as urged by the government, are equally foreboding to employers. As Chief Judge Edwards aptly noted in this case:

> Injecting the Sherman Act into the collective bargaining process would disrupt this balance by giving

[5] The threat of antitrust exposure also would apply to any unilateral changes in work preservation agreements after impasse. For example, if employers after bargaining to impasse unilaterally changed the ILA's "Rules on Containers" from a 50-mile restriction to a five-mile restriction, that action clearly would be subject to antitrust scrutiny under petitioners' and the government's position, even though it would result in less of a restraint on competition than the existing provision. *See International Longshoremen's Ass'n*, 473 U.S. at 61-67 (explaining "Rules on Containers" and the 50-mile restriction).

> unions a powerful new weapon, one not contemplated by the federal labor laws. With such a weapon at their disposal, union workers could do what the plaintiff class has done here: invoke the antitrust laws and their threat of treble damages to gain an advantage in bargaining over a salary provision about which union members do not care deeply enough to strike.

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The dissent below, and the government in its brief to this Court, somehow conclude that permitting such antitrust suits would simultaneously further the purposes of collective bargaining and advance the competition interests protected by the antitrust laws. It would have the opposite effect.

One need look no further than the recent history of collective bargaining in professional sports to see the adverse impact such a system would have on collective bargaining. Instead of settling disputes at the bargaining table through the use of economic weapons authorized by Congress, unions in professional sports repeatedly have used the federal courts in an attempt to resolve their differences. Many such cases are chronicled in the briefs of amici curiae in support of petitioners, including briefs filed on behalf of the unions in professional football, basketball, baseball, and hockey. That cannot be the labor relations model for the rest of American industry.

If the antitrust exemption were to end at impasse, unions would have an incentive to develop unreasonable bargaining proposals and to harden their bargaining positions. Instead of promoting labor peace, such a system would promote antitrust litigation. There would be lengthy disputes as to whether the parties were at "impasse," depositions would take the place of negotiating sessions, and federal courts would be in the middle of it all, serving as labor arbitrators in judicial robes. This, of course, is

totally contrary to federal labor policy, which is designed to promote private resolution of labor disputes without intervention by the government.

Stripping employers of their labor exemption at impasse also makes no sense under the rationale of this Court in *Bonanno Linen*. There, in refusing to allow an employer to withdraw from a multiemployer bargaining group after impasse, the Court recognized the need for employer solidarity at such a critical point in the collective bargaining process. The Court refused to allow the union, at impasse, to fragment the multiemployer group and destroy the integrity of the multiemployer bargaining unit. In this case, the Court should be guided by the same principles and refuse to permit the threat of antitrust litigation to "undermine the utility of multiemployer bargaining." *Bonanno Linen*, 454 U.S. at 412.

More fundamentally, there is no reason why employers engaged in multiemployer bargaining should be denied the use of self-help measures that are available to individual employers at impasse in their negotiations. As discussed in Part II of this brief, an employer's ability unilaterally to implement terms and conditions of employment at impasse has been recognized under federal labor law for more than fifty years. Neither the NLRB or any court has ever held that a multiemployer bargaining group cannot hold this economic weapon in reserve, or use it as necessary to break an impasse.

Finally, if multiemployer bargaining groups are deprived of self-help measures available to individual employers, and are exposed to financial ruin through years of antitrust litigation for doing precisely what they were established to do, the employer members of such groups simply will no longer bargain on a multiemployer basis. Under federal labor law, multiemployer bargaining is voluntary and consensual. *See, e.g., Joseph J. Callier*, 243 N.L.R.B. 1114, 1117 (1979) (stating that the essence of

multiemployer bargaining is a consensual relationship and "an unequivocal intention to be bound in collective bargaining by group rather than individual action"), *enf'd in part*, 630 F.2d 595 (8th Cir. 1980). If employers do not find it beneficial to engage in multiemployer bargaining, they will refuse to do so. It is an unfair labor practice under § 8(b)(1)(B) of the NLRA for a union to coerce an employer to bargain on a multiemployer basis. *See, e.g., NLRB v. Amax Coal Co.*, 453 U.S. 322, 334-35 (1981) ("Congress enacted § 8(b)(1)(B) . . . to prevent unions from forcing employers to join multiemployer bargaining units"). If employers in multiemployer bargaining units are deprived of legitimate economic weapons and subject to antitrust exposure, as proposed by petitioners and the government, they will be forced to abandon multiemployer bargaining, dismantle group benefit programs, and fend for themselves in individual collective bargaining negotiations. This result offends, rather than supports, federal labor policy.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

CHARLES P. O'CONNOR
(Counsel of Record)
ROBERT A. DUFEK
PETER BUSCEMI
STANLEY F. LECHNER
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000

Dated: February 16, 1996 *Attorneys for Amici Curiae*